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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-848

IGNACIO DELEON MARTINEZ,
JESUS CHAVARRIA GARCIA,

Petitioners,

v.

UNITED STATES ATTORNEY GENERAL
WILLIAM FRENCH SMITH, ET AL.
UNITED STATES OF AMERICA

Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF INVITING ATTENTION TO THE FIFTH CIRCUIT'S NOVEMBER 28, 1983 DECISION IN UNITED STATES V. INTERNATIONAL HARVESTER CO., ... F.2d 927

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The attention of the Court is respectfully invited to the fact that on November 28, 1983, the United States Court of Appeals for the Fifth Circuit entered its decision in *United States of America, Plaintiff-Appellee* v. *International Harvester Company, Defendant* v. *George S. McLean, Appellant*, ... F.2d 927, hereinafter referred to as the *McLean/Harvester* case, a copy of which decision is attached hereto as Appendix A. The *McLean/Harvester* case indirectly related to and impacted on the portion of the Petitioners' Petition for Writ of Certiorari involving Fifth Circuit Docket No. 83-2060, *Ignacio DeLeon Martinez and Jesus Chavarria, Applicants-Appellants; International Harvester Company, Defendant* v. *United States of America, Plaintiff-Appellee.*

In its decision in the *McLean/Harvester* case the Court of Appeals reaffirmed the base principle applicable to expungement cases arising within the Fifth Circuit as evidenced by its prior decisions in *United States* v. *Briggs*, 514 F.2d 794 (5th Cir. 1975); *In re Smith*, 656 F.2d 1011 (5th Cir. 1981), but held that the District Court's discretionary order denying expungement should be upheld for the reasons that:

1. The charges against McLean in the related *Crawford* indictment and the *Harvester* information were either identical or closely related, and that the *Crawford* case gave McLean "the opportunity to put the Government to its proof;"[1]

2. Neither McLean's arguments nor the record suggested that the naming of McLean in the *Harvester* case was for any advantage to the government or for any other purpose.[2]

McLean challenged the foregoing propositions in his Motion for Panel Reconsideration and Suggestion for En Banc Reconsideration.[3]

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[1] The Offer of Proof in the *McLean/Harvester* case:

(a) expanded the charges against McLean to include a charge that in the years 1977-1981 McLean falsely certified to Harvester that he had taken no action in violation of Harvester's anti-bribery policy; and stated that McLean did not hold a position that required him to report to Harvester management;

(b) stated that "there has been no evidence that any officers, directors or management of Harvester knew of or participated in the conspiracy charged in the information.

[2] McLean contends that:

(a) The government wanted a guilty plea from *Harvester* and *Harvester* wanted a $10,000 fine on a felony conspiracy charge rather than a $1,000,000 minimum fine under the Foreign Corrupt Practices Act ("FCPA").

(b) To obtain their mutual objectives the Government and Harvester reached an accommodation in which the Government falsely stated in the offer of proof in the *McLean/Harvester* case

The Petitioners believe that the decision of the Court of Appeals in the *McLean/Harvester* case indicates that absent the interjection of the "fugitive from justice" issue in the cases, the Court of Appeals would have ordered expungement of the references to the Petitioners from the cases pursuant to the rationale of the *Briggs* and *Smith* cases, *supra*.

The order of the Court of Appeals dismissing the Petitioners' appeals, which is the subject of the Petition for Writ of Certiorari, was entered without opinion. The decision in the *McLean/Harvester* case is relevant to the Second and Third issues set forth in the Petition for Writ of Certiorari filed by the Petitioners on November 21, 1983. The Court of Appeals' incorrect resolution of the "fugitive from justice" issue relates to the:

(a) Second issue before the Court, i.e., the denial to the Petitioners of the constitutionally protected right "to be free of government charges made with no opportunity to defend." *McLean/Harvester* case, Ex. A. p. 8.

(b) Third issue before the Court, i.e., the inequity and fundamental unfairness of allowing the government to denounce individuals as criminals and avoid responsibility

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that Harvester's management was unaware of the conspiracy involved in the alleged Pemex bribery scheme; and Harvester publicly proclaimed that its guilty plea was predicated on the doctrine of respondeat superior which precluded Harvester from urging a defense of lack of knowledge of its employees' violations of the FCPA.

(c) The government knew that *Harvester's* Vice President O. Morris Sievert, who was also President of Solar, was aware of all matters involving McLean's work and Solar's participation in the alleged conspiracy described in the Harvester information as evidenced by: (i) the Harvester table of management organization; and (ii) the Government's responses to McLean's Motion for a Bill of Particulars in the *Crawford* case, which responses were part of the record brought forward in the *McLean/Harvester* case and which **government responses stated that Harvester and Sievert were part of the alleged conspiracy to bribe Pemex personnel** (emphasis supplied).

for such unconstitutional actions by invoking out-of-context the rule of criminal law administration set forth in *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970).

The Fifth Circuit's imprecise caveats as to the absence of factors that would adversely affect its decision to affirm the trial court's discretionary denial of expungement coupled with its qualified references as to the wisdom of naming in an information individuals who had been indicted elsewhere as conspirators suggests a certain discontent with or uncertainty about the result reached in the *McLean/Harvester* case. In a narrow sense McLean's challenge to the Fifth Circuit's affirmation of the Trial Court's ruling in the *McLean/Harvester* case brought into issue questions as to the government's truthfulness and whether in good faith the government had sought to discharge its constitutional obligation not to violate McLean's rights. In a broad sense McLean's challenge reinforces the Petitioners' contention that in the alleged Pemex bribery scheme cases the government systematically and intentionally embraced a policy of denouncing individuals as criminals in violation of their constitutional rights as defined and established in the *Briggs* and *Smith* cases, *supra*. Such conduct by the government brings it within the ambit of this Court's rules as to the applicability of the "clean hands" doctrine and the duty of the courts to prevent "abuse, oppression and injustice" in the administration of justice, *Precision Investment Mfg. Co.* v. *Automatic Machine Co.*, 324 U.S.

806 (1945); *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240 (1933); *Krippendorf v. Hyde*, 110 U.S. 276 (1884).

Respectfully submitted,

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APPENDIX A

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

INTERNATIONAL HARVESTER COMPANY,
Defendant,

v.

GEORGE S. MCLEAN,
Appellant.

NO. 83-2202
SUMMARY CALENDAR.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

NOV. 28, 1983.

Appeal was taken from an order of the United States District Court for the Southern District of Texas, Robert O'Conor, Jr., J., which refused expungement of any mention of appellant by name in an information and related documents which he was named but not charged as a coconspirator. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that district court did not abuse discretion in refusing expungement of any mention of appellant, who was indicted for conspiracy to engage in international bribery, by name in information and related documents in which he was named but not charged as a coconspirator where the charges in the indictment and charges in the information were carved from the same fact pattern and were identical or closely related.

Affirmed.

1. Criminal Law — 1226(3)

Appellate court reviews decisions on requests to expunge by abuse of discretion standard granting a range of latitute to district court.

2. Indictment and Information — 137(1)

District court did not abuse discretion in refusing expungement of any mention of appellant, who was indicted for conspiracy to engage in international bribery, by name in information and related documents in which he was named but not charged as a coconspirator in a conspiracy to engage in international bribery where the charges in the indictment and charges in the information were carved from the same fact pattern and were identical or closely related.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, TATE and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

George S. McLean appeals from an order refusing expungement of any mention of him by name in an information and related documents because he was named but not charged as a co-conspirator in the information. We are persuaded that the trial court did not abuse its discretion because the base principle of our expungement cases has not been violated, in that McLean can defend the charge in an earlier filed and related case in which he is a charged defendant.

McLean, with eight other individuals and a corporation, was indicted on October 22, 1982 for conspiracy to engage in international bribery. McLean was also charged with multiple counts of aiding and abetting substantive violations of that charge.

On November 17, 1982 all ten defendants named in the October indictment were named but not charged as co-conspirators with International Harvester Company in a criminal information. Both the indictment and the information charged conspiracy to engage in international bribery. International

Harvester waived indictment, pled guilty, and was sentenced the next day. In connection with the plea of International Harvester the government filed an offer of proof. McLean's motion to expunge his name from all the documents filed in connection with the information was denied and he appeals.

While we have not been explicit as to the jurisdictional source(s) here available, we have previously found appellate jurisdiction to review rulings on such requested expungement both under 28 U.S.C. § 1291, concerning appeals from orders possessed of requisite finality, and under the All Writs Act. *United States* v. *Briggs*, 514 F.2d 794, 808 (5th Cir. 1975); *In re Smith*, 656 F.2d 1101 (5th Cir. 1981).

[1] We review decisions on requests to expunge by an abuse of discretion standard granting a range of latitude to the district court. That deference is warranted by its greater familiarity with the local scene and the actuality of local public events.

In *Briggs* we recognized the right of named but uncharged co-conspirators to expungement of reference to them by name. We there rejected suggested barriers of jurisdictions, standing, and political thickets and found that a federal grand jury exceeds its power in naming persons but not charging them. The holding was footed on the constitutioinal right of a citizen to be free of government charges made with no opportunity to defend. The reasoning was applied in terms of grand jury power but its reach was wider. Six years later in *In re Smith*, 656 F.2d at 1106-07, we applied the same principle to require expungement of references to Smith by name in factual resumes prepared by an Assistant United States Attorney and used in the sentencing proceedings of others.

[2] It follows from *Briggs* and *Smith* that McLean would be entitled to his requested expungement from the information and related documents if we put aside the fact of his earlier indictment. But that fact is critical because the trial of the indictment provides McLean with the required opportunity to put the

government to its proof. The charges in the indictment and the charges in the information are carved from the same fact pattern and are either identical or closely related. Significantly, the indictment charging McLean and the information naming but not charging him were filed within thirty days of each other. The government's "charges" in the information were little more than a repetition of charges earlier levelled against McLean by a federal grand jury. In sum, the government is not making an accusation without the protection of trial.

There is no suggestion that the naming of McLean was for any advantage to the government. With ongoing investigations into complicated transactions, indictments and informations with substantial overlap are inevitable. Informations provide a practical tool for implementing plea bargains that accompany such investigations. Among other advantages, charges agreed to in plea negotiation can be quickly drawn without the expense and inconvenience of returning to the grand jury. The record suggests that nothing more occurred here. On these facts we are persuaded that the trial court did not abuse his discretion in refusing expungement.

We say only that there was no abuse of discretion. We do not say that naming conspirators elsewhere indicted in an information is a wise policy or always legal. Indeed we see little to justify such a practice and much to argue against it, including the generation of collateral appeals and the draining of resources best spent more productively.[1]

AFFIRMED.

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[1] McLean suggests error in various rulings made in the case in which he was indicted. We have no jurisdiction over those interlocutory orders and make no decision concerning them.